[Caption Omitted.]

OPINION.

(Filed June 4, 1965.)

This cause is before the Court upon the motion of the plaintiff to have the Court reconsider its former opinion granting a new trial on the issue of damages. In the alternative, the plaintiff seeks to be allowed to take a discretionary appeal. Although the defendant has filed no motion to reconsider, it has filed a brief accompanied by a proposed order in which it seeks to have the Court reconsider its former opinion to the extent of granting the defendant a new trial upon all issues, rather than limiting the new trial to the issues of compensatory and punitive damages. The Court will receive and consider the defendant's brief for the purpose for which it has been filed.

An initial issue raised by the plaintiff in its motion to reconsider is with respect to the holding of the Court that the law of Tennessee must be looked to in determining the measure and elements of damage in an action for libel. In its former opinion the Court held that, this being a diversity case, it must look to the conflicts rule of Tennessee and that under such rule either the law of the forum or the law of the plaintiff's domicile would govern. Since Tennessee constituted both the forum and the place of the plaintiff's domicile, the Court must therefore look to the law of Tennessee in determining the substantive law of damages.

It is the contention of the plaintiff in this regard that the act of writing the letter complained of occurred in South Carolina, and that the law of that State, rather than the law of Tennessee, should govern with respect to proof of damages in a libel action. The fallacy in this lies in the fact that the writing of the letter did not constitute the

tort complained of. Rather, a publication was essential. Publication appears to have been effected in several states. In an action of this nature, when confronted with a choice between the law of the place where the defendant originally acted, or the law of each state in which the defamatory material was communicated, or the law of the plaintiff's domicile and principal place of business, the better reasoned cases appear to support the conflicts rule that the law of the plaintiff's domicile or the principal place of business should govern, this upon the theory that this would be the place where the plaintiff suffered the greatest harm. *Dale System, Inc. v. Time, Inc.*, 116 F. Supp. 527 (D. C., Conn., 1953); *Fouts v. Fawcett Publications*, 116 F. Supp. 535 (D. C., Conn., 1953); *Bernstein v. National Broadcasting Co.*, 129 F. Supp. 817, affirmed 232 F. 2d 369, cert. den. 352 U. S. 945.

Moreover, the parties have practiced this case throughout upon the theory that the law of Tennessee would govern. The case has been before the Court of Appeals upon a former trial upon this theory. This being so, the Court is of the opinion that the Tennessee substantive law would be the law of the case.

A more difficult problem confronts the Court with respect to the remaining issues raised upon the respective motions to reconsider.

The Court is keenly aware that this litigation has been most protracted. The original patent action out of which this libel action arose was filed in 1955. Any further trial of the case must not only delay the ultimate disposition of the case but also increase the already considerable trial expense of the parties. There have been two jury trials of this libel action, each resulting in a verdict for the plaintiff and against the defendant. In the initial trial the jury awarded the plaintiff $6,420.00 compensatory dam-

ages and $12,500.00 punitive damages. A new trial was granted upon the appeal upon the ground that the proof failed to support the award of compensatory damages. Now upon this trial the jury has again found all issues in favor of the plaintiff and awarded compensatory damages in the sum of $20,000.00 and punitive damages in the sum of $50,000.00. Upon the initial trial the verdict was sustained upon appeal insofar as it found liability upon the part of the defendant. The Court is of the opinion that the verdict upon the second trial should likewise be sustained upon the issue of liability. Thus, two juries have found in favor of the plaintiff upon the issue of liability without error. The same two juries have decided in favor of the plaintiff upon the issue of damages, but error has been found each time in the amount of damages so awarded. There is no reason to believe that the evidence would in any wise be different upon a third trial. These matters urge upon the Court the final decision of this case if it can be decided in accordance with the law and with justice to the parties.

The Court has accordingly reconsidered its former opinion and has concluded to modify the same to the extent of suggesting a remittitur in the award of compensatory damages in an amount in which the verdict has been found to exceed the proof of special damages as required by the law of Tennessee. As set forth in its former opinion, proof of special damages has been found by the Court to exist with respect to the sum of $839.36 only. A remittitur will accordingly be suggested in the award of compensatory damages in the sum of $19,160.64. As noted above, the award of punitive damages upon the first trial was in the sum of $12,500.00. The proof with respect to punitive damages was somewhat different upon the second trial. However, the Court is of the opinion

that the award of punitive damages in the sum of $50,000.00 is excessive under all of the proof. A remittitur will accordingly be suggested in the award of punitive damages in the sum of $25,000.00. Should the plaintiff not elect to accept the remittiturs herein suggested, a new trial will be granted upon all issues. Should the plaintiff elect to accept the remittiturs as herein suggested, the defendant's motion for new trial will be overruled. The former opinion of the Court upon the defendant's judgment n.o.v. and for a new trial will be modified accordingly. The entry of an order upon this opinion and upon the former opinion of the Court as herein modified will await the filing within ten (10) days of a written notice by the plaintiff of its election with respect to the remittiturs as herein suggested. Should the plaintiff not elect to accept the remittiturs as herein suggested, the further trial of this cause will be set for July 29, 1965.

FRANK W. WILSON,
United States District Judge.

[Caption Omitted.]

ORDER.

(Filed July 8, 1965, on the motion for new trial and motion for judgment n.o.v. following the second trial. This was the order granting a new trial following the second trial. The third trial followed this order.)

This case is before the Court upon the motion of the defendant, Deering Milliken Research Corporation, for a judgment notwithstanding the verdict or in the alternative upon a motion for a new trial. Having considered the motion, the Court was of the opinion that the motion for a judgment notwithstanding the verdict should be overruled but that the motion for a new trial should be granted to the extent of granting a new trial upon the issue of damages only, all as set forth in an opinion filed March 16, 1965. Thereafter each party moved the Court to reconsider its opinion granting a new trial but limiting the same to the issue of damages, and having reconsidered the Court filed a further opinion upon June 4, 1965, modifying its former opinion to the extent of suggesting a remittitur in compensatory damages from $20,000.00 to $839.36 and suggesting a remittitur in punitive damages awarded from $50,000.00 to $25,000.00 and conditioning the granting of a new trial upon the failure of the plaintiff to accept the said remittitur but granting a new trial upon all issues should the plaintiff elect not to accept the said remittitur. Thereupon the plaintiff filed an election not to accept the remittitur as suggested and requesting the Court to allow a discretionary appeal upon certain issues of law. Having considered further the request for a discretionary appeal, the Court is of the opinion that the same should be denied and that this cause should be set for trial upon all issues upon July 29, 1965.

It is accordingly ORDERED

(1) That the motion of the defendant, Deering Milliken Research Corporation, for a judgment notwithstanding the verdict be and hereby is overruled;

(2) That the motion of the defendant, Deering Milliken Research Corporation, for a new trial be and hereby is granted, said new trial to be held upon all issues, the plaintiff having filed a written election not to accept the remittitur suggested by the Court;

(3) That the plaintiff's request to be allowed to take a discretionary appeal be and hereby is denied; and

(4) That this case be set for trial upon July 29, 1965.

APPROVED FOR ENTRY.

FRANK W. WILSON,
United States District Judge.